



1410-72-P

LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Chapter III

[Docket No. 15-CRB-0010-CA]

Adjustment of Cable Statutory License Royalty Rates

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Proposed rule.

SUMMARY: The Copyright Royalty Judges (Judges) publish for comment proposed regulations governing royalty rates and terms for the distant retransmission of over-the-air television and radio broadcast stations by cable television systems to their subscribers.

DATES: Comments are due no later than [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Submit electronic comments via email to crb@loc.gov or online at <http://www.regulations.gov>. Those who choose not to submit comments electronically should see How to Submit Comments in the Supplementary Information section below for physical addresses and further instructions. The proposed rule is also posted on the agency's website (www.loc.gov/crb).

FOR FURTHER INFORMATION CONTACT: Kimberly Whittle, Attorney Advisor, by telephone at (202) 707-7658, or by e-mail at crb@loc.gov.

SUPPLEMENTARY INFORMATION:

Background

On January 15, 2016, the Copyright Royalty Judges (Judges) received a motion from the National Cable & Telecommunications Association, the American Cable Association, and a group referring to itself as the “Phase I Parties” requesting that the Judges adopt a partial settlement of the movants’ interests regarding royalty rates and terms for the statutory copyright license for eligible cable retransmissions for the period 2015-2019. The settlement proposes that the rates, terms, and gross receipts limitations remain the same as those currently in effect. *See* 17 U.S.C. 111(d)(1)(B) and 37 C.F.R. 256.2(c)-(d). Motion of the Participating Parties to Adopt Partial Settlement, Docket No. 15-CRB-0010-CA (2015-2019) (Motion). The Judges hereby publish proposed regulations reflecting the proposed settlement and request comments from interested parties as required by 17 USC 801(b)(7)(A).

Section 111 of the Copyright Act grants a statutory copyright license to cable television systems for the distant retransmission of over-the-air television and radio broadcast stations to their subscribers. 17 U.S.C. 111(c). In exchange for the license, cable operators submit to the Copyright Office semiannually royalty payments and statements of account detailing their retransmissions. 17 U.S.C. 111(d)(1). The Copyright Office deposits the royalties into the United States Treasury for later distribution to copyright owners of the broadcast programming that the cable systems retransmit. 17 U.S.C. 111(d)(2).

A cable system calculates its royalty payments in accordance with the statutory formula described in 17 U.S.C. 111(d)(1). Royalty rates are based upon a cable system’s gross receipts from subscribers who receive retransmitted broadcast signals. For rate calculation purposes, cable systems are divided into three tiers based on their gross receipts (small, medium, and large). 17 U.S.C. 111(d)(1)(B) through (F). Both the applicable rates and the tiers are subject to adjustment. 17 U.S.C. 801(b)(2).

Every five years persons with a significant interest in the royalty rates may file petitions to initiate a proceeding to adjust the rates. 17 U.S.C. 804(a) and (b). No person with a significant interest filed a petition to initiate a proceeding in 2015.¹ Therefore, the Judges initiated this rate adjustment proceeding by notice published in the **Federal Register** in June 2015. *See* 17 U.S.C. §§ 801(b)(2), 803(b)(1), 804(a) and (b); 80 FR 35403 (Jun. 19, 2015).

The Judges received two joint Petitions to Participate, one from the National Cable & Telecommunications Association and the American Cable Association and another from a group referring to itself as the “Phase I Parties”.² The Judges accepted these petitions and commenced a Voluntary Negotiation Period (VNP).

On December 15, 2015, at the conclusion of the VNP, all participants notified the Judges that they had settled and asked that cable retransmission rates remain unchanged for the rate period 2015 to 2019, inclusive. On November 23, 2015, however, one of the participants, the Joint Sports Claimants (JSC),³ had filed a “Petition ... to Initiate Cable Royalty Rate Adjustment Proceedings” with a self-styled caption indicating a proceeding for cable rate adjustments “for Retransmission of Certain Sports Telecasts.” Given the seemingly conflicting positions of the JSC, the Judges rejected the settlement, without prejudice.

¹ The cable rates were last adjusted in 2005, at a time when the Copyright Office was transferring responsibility for royalty rate proceedings from Copyright Arbitration Royalty Panels (CARP) to the newly authorized Copyright Royalty Judges. Although the Judges commenced a rate proceeding relating to the 2010 rate adjustment, the Judges terminated it when passage of the Satellite Television Extension and Localism Act of 2010, Pub. L. No. 111-151, 124 Stat. 1027 (“2010 STELA”), rendered the proceeding unnecessary. *See* Order Granting Request to Terminate Proceeding, Docket No. 2010-1 CRB Cable Rate (July 13, 2010). At that time, although the act changed the relevant rates, neither the Register of Copyrights nor the Judges updated the statement of the prior rates in subsections (a) and (b) of section 256 of 37 C.F.R., the chapter of the Regulations applying to CARP. The STELA Reauthorization Act of 2014 did not change the cable royalty rates in § 111. *See* Pub. L. No. 113-200, 28 Stat. 2059 (Dec. 4, 2014).

² The Phase I Parties consist of Program Suppliers, Joint Sports Claimants, Public Television Claimants, Commercial Television Claimants, Music Claimants, Canadian Claimants Group, National Public Radio, and Devotional Claimants.

³ Joint Sports Claimants are: the National Basketball Association, the National Collegiate Athletic Association, the National Football League, the National Hockey League, the Office of the Commissioner of Baseball, and the Women’s National Basketball Association.

The settling participants have now asked that the Judges adopt the settlement and permit continuing proceedings to determine whether and to what degree to make a rate adjustment under section 801(b)(2)(C). Motion at 1, 6-7. Section 801(b)(2)(C) provides for adjustment proceedings⁴ in the event the Federal Communications Commission (FCC) changes its rule “with respect to ... sports program exclusivity....” The JSC base their November 23, 2015 petition on an FCC rule change, *viz.*, repeal of the sports exclusivity rules, effective November 24, 2014.⁵ The Judges announce commencement of further proceedings on the issue raised by that petition in a separate notice in the **Federal Register**.

The Participating Parties state that they

do not believe that the JSC Sports Rule Petition precludes adoption of their agreement as set forth in the Dec. 15 Settlement Notice. That agreement concerns only the Quinquennial Cable Rate Adjustments. It resolves all issues concerning those quinquennial adjustments by agreeing to retain without change the *existing* cable royalty rates (the base rates, 3.75 percent rate and the Syndicated Exclusivity Surcharge) and *existing* gross receipts limitations during the years 2015-19. It simply does not address the issue of whether the Judges should make any changes in cable rates pursuant to 17 U.S.C. § 801(b)(2)(B) & (C) to account for changes in FCC cable rules.

Motion at 5-6 (emphasis original).

Statutory Timing of Adoption of Rates and Terms

Section 801(b)(7)(A) allows for the adoption of rates and terms negotiated by “some or all of the participants in a proceeding at any time during the proceeding” provided the parties

⁴ Apart from the quinquennial proceedings required by § 804 of the Act.

⁵ Petition of the Joint Sports Claimants to Initiate Cable Royalty Rate Adjustment Proceedings (Nov. 23, 2015). In its petition, JSC requests that the Judges “initiate proceedings to adjust the cable statutory license royalty rates ‘to assure that such rates are reasonable in light of’ the repeal of the Sports Blackout Rules.” Petition at 1. In its Motion to Adopt Partial Settlement, the self-styled “Participating Parties,” which includes JSC, states that “[t]he Joint Sports Rule Petition requests a new Section 111 royalty rate pursuant to 17 U.S.C. § 801(b)(2)(C) to account for the November 2014 elimination of the [FCC’s] Sports Rule (a “Sports Rule Surcharge”). Motion at 1-2. According to the Motion, “[n]either the Judges nor their predecessors have previously conducted any proceeding under Section 801(b)(2)(C) to consider the adoption of a cable rate to account for changes in the FCC Sports Rule,” although Section 801(b)(2)(C) has been invoked twice since its enactment with respect to the syndicated exclusivity provision of the section. Motion at 2, n.2.

submit the negotiated rates and terms to the Judges for approval. That provision directs the Judges to provide those who would be bound by the negotiated rates and terms an opportunity to comment on the agreement. Unless a participant in a proceeding objects and the Judges conclude that the agreement does not provide a reasonable basis for setting statutory rates or terms, the Judges adopt the negotiated rates and terms. 17 U.S.C. 801(b)(7)(A).

If the Judges adopt the proposed rates and terms pursuant to this provision for the 2015-2019 rate period, the adopted (and thus, existing) rates and terms and gross receipts limitations will continue to be binding on all cable systems that retransmit distantly over-the-air television and radio broadcast stations to their subscribers and on all copyright owners of the broadcast programming that the cable systems retransmit during the license period 2015-2019, ***except to the extent those rates and terms may be adjusted for sports programming in the portion of the proceeding focused on the effect, if any, of the FCC Sports Exclusivity Rule change.***

Proposed Adjustments to Rates and Terms

If the Judges adopt the proposed rules that include the terms of the settlement, these rules shall take effect upon final adoption. The Judges have statutory authority to promulgate their own rules which, when adopted, shall render inapplicable the prior rules that pertained to the rates and terms as established by the now defunct CARP, in part 256 of the existing regulation (37 C.F.R., part 256).

The Judges will update the terms, eliminate surplus verbiage, make the rules easier to read, and codify them in Chapter 3 of Title 37 of the CFR. Chapter 3 is the chapter that governs Copyright Royalty Board proceedings. If adopted, the proposed rules shall be designated “part 387.”

Interested parties may comment and object to any or all of the proposed regulations contained in this notice. Such comments and objections must be submitted no later than [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

How to Submit Comments

Interested members of the public must submit comments to only **one** of the following addresses. If not commenting by email or online, commenters must submit an original of their comments, five paper copies, and an electronic version on a CD.

Email: crb@loc.gov; or

Online: <http://www.regulations.gov>; or

U.S. mail: Copyright Royalty Board, PO Box 70977, Washington, DC 20024-0977; or

Overnight service (only USPS Express Mail is acceptable): Copyright Royalty Board, P.O. Box 70977, Washington, DC 20024-0977; or

Commercial courier: Address package to: Copyright Royalty Board, Library of Congress, James Madison Memorial Building, LM-403, 101 Independence Avenue SE, Washington, DC 20559-6000. Deliver to: Congressional Courier Acceptance Site, 2nd Street NE and D Street NE, Washington, DC; or

Hand delivery: Library of Congress, James Madison Memorial Building, LM-401, 101 Independence Avenue SE, Washington, DC 20559-6000.

List of Subjects in 37 CFR Part 387

Copyright, Cable Television, Royalties

Proposed Regulations

For the reasons set forth in the preamble, and under the authority of chapter 8, title 17, United States Code, the Copyright Royalty Judges propose to amend 37 CFR Chapter III as follows:

Add a new Part 387.

PART 387—ADJUSTMENT OF ROYALTY FEE FOR CABLE COMPULSORY LICENSE

Sec.

387.1 General

387.2 Royalty fee for compulsory license for secondary transmission by cable systems.

AUTHORITY: 17 U.S.C. 801(b)(2), 803(b)(6).

§387.1 General

This part establishes adjusted terms and rates for royalty payments in accordance with the provisions of 17 U.S.C. 111 and 801(b)(2)(A), (B), (C), and (D). Upon compliance with 17 U.S.C. 111 and the terms and rates of this part, a cable system entity may engage in the activities set forth in 17 U.S.C. 111.

§387.2 Royalty fee for compulsory license for secondary transmission by cable systems.

(a) Royalty fee rates. Commencing with the first semiannual accounting period of 2015 and for each semiannual accounting period thereafter, the royalty fee rates for secondary transmission by cable systems are those established by 17 U.S.C. 111(d)(1)(B)(i)-(iv), as amended.

(b) Alternate tiered rates. Commencing with the first semiannual accounting period of 2015 and for each semiannual accounting period thereafter, the alternate tiered royalty fee rates for cable systems with certain levels of gross receipts as described in 17 U.S.C. 111(d)(1) (E) and (F), are those described therein.

(c) 3.75 percent rate. Commencing with the first semiannual accounting period of 2015, and for each semiannual accounting period thereafter, and notwithstanding paragraphs (a) and (d) of this section, for each distant signal equivalent or fraction thereof not represented by the carriage of:

(1) Any signal that was permitted (or, in the case of cable systems commencing operations after June 24, 1981, that would have been permitted) under the rules and regulations of the Federal Communications Commission in effect on June 24, 1981, or

(2) A signal of the same type (that is, independent, network, or non-commercial educational) substituted for such permitted signal, or

(3) A signal that was carried pursuant to an individual waiver of the rules and regulations of the Federal Communications Commission in effect on June 24, 1981; in lieu of the royalty rates specified in paragraphs (a) and (d) of this section, the royalty rate shall be 3.75 percent of the gross receipts of the cable system for each distant signal equivalent. Any fraction of a distant signal equivalent shall be computed at its fractional value.

(d) Syndicated exclusivity surcharge. Commencing with the first semiannual accounting period of 2015 and for each semiannual accounting period thereafter, in the case of a cable system located outside the 35-mile specified zone of a commercial VHF station that places a predicted Grade B contour, in whole or in part, over the cable system, and that is not significantly viewed or otherwise exempt from the FCC's syndicated exclusivity rules in effect on June 24, 1981, for each distant signal equivalent or fraction thereof represented by the carriage of such commercial VHF station, the royalty rate shall be, in addition to the amount specified in paragraph (a) of this section,

(1) For cable systems located wholly or in part within a top 50 television market,

- (i) 0.599 percent of such gross receipts for the first distant signal equivalent;
 - (ii) 0.377 percent of such gross receipts for each of the second, third, and fourth distant signal equivalents; and
 - (iii) 0.178 percent of such gross receipts for the fifth distant signal equivalent and each additional distant signal equivalent thereafter;
- (2) For cable systems located wholly or in part within a second 50 television market,
 - (i) 0.300 percent of such gross receipts for the first distant signal equivalent;
 - (ii) 0.189 percent of such gross receipts for each of the second, third, and fourth distant signal equivalents; and
 - (iii) 0.089 percent of such gross receipts for the fifth distant signal equivalent and each additional distant signal equivalent thereafter;
- (3) For purposes of this section “top 50 television markets” and “second 50 television markets” shall be defined as the comparable terms are defined or interpreted in accordance with 47 CFR 76.51, as effective June 24, 1981.

(e) **Computation of rates.** Computation of royalty fees shall be governed by 17 U.S.C. § 111(d)(1)(C).

Dated: April 20, 2016.

Suzanne M. Barnett,
Chief Copyright Royalty Judge

[FR Doc. 2016-09626 Filed: 4/25/2016 8:45 am; Publication Date: 4/26/2016]